

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MICHELLE NELSON,

:

Plaintiff,

:

96 Civ. 9331 (LAP) (HBP)

-against-

:

REPORT AND
RECOMMENDATION

GROUP HEALTH INC.,

:

Defendant.

:

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PITMAN, United States Magistrate Judge:

TO THE HONORABLE LORETTA A. PRESKA, Chief Judge,

Southern District of New York,¹

By motion dated December 3, 2010 (Docket Item 15),
plaintiff moves to restore her case to the Court's docket. For
the reasons set forth below, I respectfully recommend that the
motion be denied.

¹This matter was originally assigned to the Honorable Michael B. Mukasey, who referred the matter to me for general pretrial supervision and for trial pursuant to 28 U.S.C. § 636(c). However, because no stipulation consenting to my jurisdiction was filed, I deemed the reference to be a reference for general pretrial supervision and to report and recommend with respect to dispositive motions. As discussed in the text, Judge Mukasey dismissed the matter without prejudice in January 1999. Because this action was closed when Judge Mukasey resigned from the bench in 2006, it was never re-assigned to another District Judge. Accordingly, I make this report and recommendation to you as Chief Judge.

Plaintiff commenced this pro se employment discrimination action pursuant to Title VII, 42 U.S.C. §§ 2000e et seq. on December 12, 1996. I granted plaintiff's application to have her case added to the list of cases considered by the Court's Pro Bono Panel on February 5, 1998 and stayed the matter while plaintiff's case was considered by members of the panel (Docket Item 10). Unfortunately, no member of the panel ever volunteered to represent plaintiff, and she remained a pro se litigant.

On September 11, 1998, I wrote the following letter to plaintiff:

As you may recall, your action has been dormant for several months now to permit consideration by the Court's Pro Bono Panel. To date, no volunteer attorney has agreed to take your case, and it appears that if you wish to proceed with your claim, you will have to represent yourself.

I have been advised by my Courtroom Deputy, Mr. Daniel Ortiz, that you are considering voluntarily withdrawing your claim in this matter. Obviously, this decision is up to you and you alone, and I have no opinion whatsoever as to whether you should or should not withdraw your claim. However, in light of the long period of inactivity, it is imperative that you make your decision promptly.

Accordingly, no later than October 15, 1998, please report to me in writing, with a copy to counsel for defendant, whether you wish to discontinue your lawsuit. If you do wish to discontinue your lawsuit, you should discuss with defendant's counsel whether your withdrawal will be with or without prejudice. A claim that is withdrawn with prejudice cannot be brought again in the future; a claim that is withdrawn

without prejudice can be refiled as a new action in the future.

If you have any procedural questions concerning this matter, I suggest you contact the Office of the Pro Se Clerk at United States Courthouse, Southern District of New York, 500 Pearl Street, Room 230, New York, New York, (212) 805-0175.

On October 1, 1998, plaintiff responded to my letter, stating:

I have received your communication concerning the discontinuance of my lawsuit against Group Health Incorporated. To my great dismay, I must, at this time, discontinue this suit without prejudice. Having this suit open has profoundly affected my personal and financial life.

I sincerely thank you for your patience and assistance in this matter.

After securing defendant's consent in writing to the dismissal of the action without prejudice, I issued a report and recommendation on November 24, 1998 recommending that the matter be dismissed without prejudice (Docket Item 13). My report and recommendation was adopted by Judge Mukasey on January 4, 1999 and the case was dismissed without prejudice (Docket Item 14).

In her motion to restore her case, plaintiff explains that personal upheavals in her life, including a divorce, the loss of her home, the loss of her job and parenting the children of her deceased relatives prevented her from seeking to restore

the action sooner. Defendant objects to the motion on the ground that it is time-barred.

An employment discrimination action under Title VII must be commenced within 90 days of plaintiff's receipt of her right to sue. 42 U.S.C. § 2000e-5(f)(1); Tiberio v. Allergy Asthma Immunology of Rochester, Docket No. 11-2576-cv, 2011 WL 6355289 at *1 (2d Cir. Dec. 20, 2011); Joseph v. Athanasopoulos, 648 F.3d 58, 63 n.5 (2d Cir. 2011). Even if I assume that plaintiff had the full 90 days from the dismissal of her action in which to reinstate it -- the most favorable assumption possible -- her present motion, made more than ten years after the dismissal of her action, is clearly untimely.

I readily accept the truth of plaintiff's statements concerning the difficult events that have occurred in her life over almost a twelve-year period between the dismissal of her action and her motion to restore her action. Nevertheless, these hardships do not excuse plaintiff's non-compliance with the applicable limitations period. Although it is theoretically possible that the doctrine of equitable tolling might provide an excuse for plaintiff's failure to move to restore her action in a timely manner, in order to invoke this doctrine, plaintiff would have to demonstrate that extraordinary circumstances prevented her from moving to restore her action during the almost twelve-

year period between the dismissal of her action and her motion to restore her action and that she acted with due diligence throughout the period. Falso v. Gates Chili Cent. School Dist., 408 F. App'x 494, 496 (2d Cir. 2011); see generally Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 121 (2002). Although plaintiff appears to have had many personal difficulties since her action was dismissed, the present record does not demonstrate that these problems were so severe and pervasive that they presented an insurmountable obstacle to plaintiff's prosecuting her claim. See Boos v. Runyon, 201 F.3d 178, 185 (2d Cir. 2000) (plaintiff's claim that she suffered from "'paranoia, panic attacks, and depression'" did not justify application of equitable tolling "without a particularized description of how her condition adversely affected her capacity to function generally or in relationship to the pursuit of her rights").

Accordingly, for all the foregoing reasons, I respectfully recommend that plaintiff's motion to restore her case to the Court's active docket be denied in all respects.

OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b)(2) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from the date of this Report and Recommenda-

tion to file written objections. See also Fed. R. Civ. P. 6(a) and 6(d). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Loretta A. Preska, United States District Judge, 500 Pearl Street, Room 2220, New York, New York 10007, and to the chambers of the undersigned, 500 Pearl Street, Room 750, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Preska. FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS **WILL** RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. Thomas v. Arn, 474 U.S. 140 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983).

Dated: New York, New York
December 29, 2011

Respectfully submitted,


HENRY PITMAN
United States Magistrate Judge

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